

BOARD OF APPEALS CASE NO. 5234

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BEFORE THE

APPLICANT: APC Realty & Equipment Co., LLC,
Sprint PCS & Edward Harkins

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ZONING HEARING EXAMINER

REQUEST: Special Exception to locate a
communications tower in the Agricultural District;
2622 Ady Road, Forest Hill

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 3/6/02 & 3/13/02

HEARING DATES: May 6, 2002

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Record: 3/8/02 & 3/15/02

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ZONING HEARING EXAMINER'S DECISION

The Applicants, APC Realty & Equipment Company, LLC (Sprint PCS), and Edward Harkins, are requesting a special exception, pursuant to Sections 267-53.4C, 267-53.5 and 267-53.6 of the Harford County Code, to locate a communication tower in the AG/Agricultural District.

The subject parcel is located on the west side of Ady Road (MD Route 543), north of Chestnut Hill Road and is more particularly identified on Tax Map 34, Grid 2B, Parcel 7. The parcel consists of 80.5± acres, is currently zoned AG/Agricultural and is entirely within the Third Election District.

The Code requirements for grant of a special exception are set forth as follows:

Section 267-52. General regulations.

- A. Special exceptions require the approval of the Board in accordance with § 267-9, Board of Appeals. The Board may impose such conditions, limitations and restrictions as necessary to preserve harmony with adjacent uses, the purposes of this Part 1 and the public health, safety and welfare.
- B. A special exception grant or approval shall be limited to the final site plan approved by the Board. Any substantial modification to the approved site plan shall require further Board approval.
- C. Extension of any use or activity permitted as a special exception shall require further Board approval.
- D. The Board may require a bond, irrevocable letter of credit or other appropriate guaranty as may be deemed necessary to assure satisfactory performance with regard to all or some of the conditions.

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- E. In the event that the development or use is not commenced within three (3) years from date of final decision after all appeals have been exhausted, the approval for the special exception shall be void. In the event of delays, unforeseen at the time of application and approval, the Zoning Administrator shall have the authority to extend the approval for an additional twelve (12) months or any portion thereof.”

Findings of Fact

A number of witnesses appeared on behalf of the Applicant. First to testify was Mr. Edward Harkins who lives at 2622 Ady Road, who represented that he is the property owner and that he has entered into a long term lease with Sprint PCS to lease a portion of his property for erection of a communications tower. He supports the application and is, in fact, a co-applicant in the request before the Board. Mr. Hassan Khalil appeared and qualified as an expert Radio Frequency (RF) Engineer. Mr. Khalil is responsible for design of RF systems at Sprint and described the coverage area of the proposed tower, the alternate tower sites, FCC requirements and power requirements and output of the proposed tower. Vincent Bacchi appeared and indicated that his employment with Sprint PCS involves locating appropriate sites for location of communication towers. The witness described the efforts he made in locating this site and potential alternative sites. Ms. Mary Anne Kiernan qualified as an expert civil engineer employed with KCI Engineering, the project manager for the site. Ms. Kiernan described the surrounding area, the proposed structure and ancillary equipment and addressed each of the Guides, Limitations and Standards set forth in Section 267-9I of the Harford County Code.

Mr. Anthony McClune testified on behalf of the Department of Planning and Zoning. Mr. McClune summarized the Department’s report findings and recommendations. In Mr. McClune’s opinion and that of the Department of Planning and Zoning, the proposed tower meets or exceeds all of the requirements of the Harford County Code and recommended approval of the request.

There were a number of area residents that attended the hearing and asked questions throughout the proceedings; however, nobody appeared in opposition to this request.

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The applicable Code Sections and the Hearing Examiner's findings (in *italics*) follow:

Section 267-53.4.C Communications towers.

Communications towers shall be allowed by special exception, up to 199 feet, in the R, RR, R1, R2, VR, VB, B1, B2 and AG Districts.

The proposed tower is less than 199 feet and the subject property is zoned AG.

Section 267-53.5. Provisions applicable to all communications towers.

- A. All communications towers shall be structurally designed to accommodate for co-location, which shall mean the ability of structure to allow for the placement of antennas for 3 or more carriers. This provision may be waived by the approving body if it is determined that a co-location design will have an adverse impact on the surrounding area.

This tower is designed for co-location to accommodate other carriers. Additionally, the compound itself is designed to accommodate three (3) other communication towers and supporting equipment.

- B. No aviation-related lighting shall be placed upon any communications tower unless specifically required by the Federal Aviation Administration or other governmental entity.

There is no aviation lighting planned for this tower.

- C. Monopoles shall be the preferred communications tower structure type within the county.

The proposed tower is a monopole design.

- D. To the extent practicable, communication towers shall have suitable landscaping in order to screen the site from adjoining properties.

Landscaping is proposed and conditions of approval recommended by the Department of Planning and Zoning include the necessity of submitting a landscaping plan.

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- E. The only signage permitted on any communications tower shall be a single sign no larger than 6 square feet, affixed to the equipment building or fence enclosure that identifies the tower owner, each locating provider and the telephone number for the person to contact in the event of an emergency.

No signage is proposed.

- F. Upon completion of a communications tower and every 5 years after the date of completion, the owner of the tower shall submit to the Zoning Administrator written certification from a professional engineer verifying that the tower meets all applicable Building Code and safety requirements applicable at the time the original building permit was issued. Failure to submit said certification 60 days of written notification by the Department of Planning and Zoning to the owner of the tower or any successor in interest shall result in the start of the revocation process for the tower approval.

The Applicant's witnesses expressed their intent to comply with these provisions of the Harford County Code.

- G. All zoning certificate applications for the construction of 15 new communications towers shall be subject to the DAC review process, with the following additional requisites:
- (1) Whether an applicant has satisfied the radio frequency need requirements identified in this section shall be reviewed by a radio frequency engineer. The engineer shall be retained by the county from an approved panel of such engineers to be created and maintained by the county. The engineer shall determine whether the applicant has shown a radio frequency need, based on coverage and/or capacity issues, or other engineering requisites, to construct a new communications tower;
 - (2) When the communications tower is permitted by right, the engineer's determination shall be made in the ordinary course of DAC review;
 - (3) When the communications tower is allowed by special exception, the county's radio frequency engineering review shall be made in connection with the staff report review pursuant to Chapter A274-1.D. Such review will be completed prior to any zoning hearing and will preclude further DAC review of radio frequency issues; and

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- (4) The county's radio frequency engineer shall ensure that any new tower does not interfere with or obstruct existing or proposed communications towers designed for public safety use.

The Department of Planning and Zoning has recommended as a condition of approval that DAC review and approval be obtained. The applicant submitted for review to the County's RF engineer all requested radio frequency data and the County's RF Engineer issued a favorable report made part of the record as Attachment 10 to the Department of Planning and Zoning's staff report. The County's RF Engineer, Mr. Dave Prebeck, concluded that the proposed tower fills an identified coverage gap in the Sprint PCS network; that the proposed structure will not require FCC registration or aviation lighting; and confirmed that Sprint PCS proposed tower does not interfere with the current or proposed microwave paths for the Public Safety radio system.

- H. The applicant shall be responsible for maintaining the communications tower in a safe condition.

The Applicant's witnesses indicated their intent to comply with these provisions of the Harford County Code.

- I. Communications towers shall be utilized continuously for wireless communications. In the event that a communications tower ceases to be used for wireless communications for a period of 6 months, the approval will be revoked. In the event that the Zoning Administrator is presented with evidence that further viability of the tower is imminent, the Zoning Administrator may grant one extension of the approval for a period not to exceed 6 months beyond the revocation of the use. The applicant shall take all necessary steps to dismantle the tower and remove and dispose of all visible remnants and materials from the subject parcel 90 days after termination. The applicant shall ensure removal of the tower and all associated accessory structures by posting an acceptable monetary guarantee with the county on forms provided by the office of the Zoning Administrator. The guarantee shall be submitted prior to the issuance of a building permit and shall be for an amount equal to a cost estimate approved by the Zoning Administrator for the removal of the tower, plus a 15% contingency.

The Applicant's witnesses indicated their intent to comply with these provisions of the Harford County Code.

J. Every application for the construction of a new communications tower shall include the following:

- (1) Information demonstrating the applicant's radio frequency need for the facility, including computer modeling information, an explanation as to why co-location is not feasible and a list of alternative sites considered;**

The Applicant submitted computer models of the coverage currently existing and resulting after erection of the proposed tower. These models lead to the conclusion that there is a gap in the Sprint PCS network in and near the proposed location that is filled by the proposed communication tower. The witnesses for Sprint identified several other locations that they reviewed as a co-location possibility. Each of these proved inadequate or unavailable.

- (2) A checklist prepared in conformity with Section 106 of the National Environmental Policy Act and any other documents filed by the applicant with the FCC related to this site if requested by the Department;**

The required checklist was submitted by the Applicant and was made part of Attachment 10, Tab 7 of the Department of Planning and Zoning's Staff Report.

- (3) A site plan, including the layout of the site, a drawing or other physical depiction of the proposed communications tower and any equipment buildings, and a map showing the area within a one mile radius of the tower;**

A site plan was submitted into evidence and fully described by the Applicant's witnesses. There was no testimony challenging the accuracy of the site plan submitted.

- (4) A description of the number of carriers' equipment that the tower can accommodate and a statement as to whether the applicant will allow other carriers to co-locate on the facility;**

The Applicant's witnesses thoroughly discussed the design of the tower to accommodate additional antennae as well as the site design which will accommodate three additional communication towers at this location.

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- (5) Documentation demonstrating the tower shall be designed and constructed in accordance with any applicable American National Standards Institute standards;

The Applicant has demonstrated that the tower is designed and will be constructed in accordance with applicable American Standards Institute standards.

- (6) Proof that the applicant owns or otherwise has permission to use the site, along with any easements necessary to access the site;

The Applicant provided a “Site Agreement” executed by and between the co-Applicants.

- (7) A certification from each carrier that will utilize the facility that its equipment will meet all applicable federal standards governing the emission of energy from such facilities; and

The Applicant submitted the required certification.

- (8) A nonbinding 5-year plan showing the applicant's existing and proposed communications network within the county. In accordance with state law on access to public records, § 10-611 et seq. of the State Government Article, the Department shall treat the 5-year plan it obtains as confidential and shall not permit public inspection of that information.

The Applicant submitted its plan in accordance with these provisions of the Harford County Code.

- K. When proposing a new communications tower, the applicant must demonstrate a radio frequency need for such a facility by showing:

- (1) That the applicant has researched the co-location possibilities in the area, including in its research a review of the county's database of structures; and

The Applicant provided substantial data to support its efforts to find a suitable co-location tower.

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- (2) That due to the absence of sufficiently tall structures in the search area, the absence of structural capacity on existing structures or other valid engineering or economic factors, no viable co-location opportunities exist in the search area.

The Applicant provided a full and complete explanation regarding the unsuitability of each of the possible co-locations it discovered.

Section 267-53.6. Additional special exception requirements.

An applicant proposing a new communications tower in the R, RR, R1, R2, VR, VB, B1, B2 or AG Districts shall demonstrate that the request complies with the following conditions:

- A. The placement of the communications tower at the proposed location will not have a material negative impact on the value, use or enjoyment of any adjoining parcel.

The Applicant introduced an extensive study of the impact of monopole communication towers on the value of adjoining parcels which concluded that the erection of the proposed monopole at the proposed location will not have a material adverse impact on the value, use or enjoyment of any adjoining parcel.

- B. The applicant has made a diligent attempt to locate the applicant's antenna on an existing tower or nonresidential building or structure.

The Applicant provided ample evidence of its attempts to co-locate its antennae on an existing tower or structure and fully explained the reasons why none of the possible co-location sites was suitable or available to the Applicant.

- C. The applicant shall provide the following additional information in support of its application:

- (1) Photographs of existing site conditions;

Photographs were provided by the Applicant of the site and surrounding area.

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- (2) Photographs demonstrating that a balloon test has been conducted, or other evidence depicting the visual impact of the proposed tower within a one mile radius of the tower; and

Computer generated models and balloon test photos were submitted b the Applicant and fully indicate the visual impact created by this tower within a one mile radius of the proposed location.

- (3) A map describing the topography of the site and the area within a one-mile radius of the proposed tower.

The Applicant submitted a map that indicates the topography of the site within a one mile radius of the proposed site.

In addition to meeting each of the above requirements, the testimony of Anthony McClune addressed each of the “Limitations, Guides and Standards” set forth at Section 267-9I of the Harford County Code and, after addressing each of those, concluded that this tower at this location would generate no material impacts over and above those normally associated with a monopole communication tower of this height. The Department of Planning and Zoning recommends approval of the requested special exception.

Conclusion and Recommendation

The Hearing Examiner finds, based on the facts set forth above, that the Applicant can meet or exceed each and every requirement of the Harford County Code. In addition to specific statutory requirements, Maryland Courts have had occasion to discuss the burden of proof that must be met by an applicant in a special exception case.

Under Maryland law, the special exception use is part of the comprehensive zoning plan sharing the presumption, that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption.

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The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in a particular case is in harmony with the general purpose and intent of the plan. Schultz v. Pritts, 291 Md. 1, 432 A. 2d 1319, 1325 (1981) (“Schultz”).

“While the applicant in such a case has the burden of adducing testimony, which will show that, his use meets the prescribed standards and requirements of the zoning code, he does not have the burden of showing affirmatively that his proposed use accords with the general welfare. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely effect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material; but if there is not probative evidence of harm or disturbance in light of the nature of the zoning involved or of factors causing disharmony to the functioning of the comprehensive plan, a denial of an application for special exception is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A. 2d 543, 550-551 (1973) (“Turner”). The appropriate standard to be used in determining whether a requested special exception use should be denied is whether there are facts and circumstances that show the particular use proposed at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. See Schultz at 432 A. 2d 1327.

Such facts and circumstances must be strong and substantial to overcome the presumption that the proposed use be allowed in the district. Anderson v. Sawyer, 23 Md. App. 612, 329 A. 2d 716, 724 (1974) (“Anderson”).

The law in Maryland is clear that the localized impact caused by a special exception must be unique and atypical in order to justify denial. Sharp v. Howard County Board of Appeals, 98 Md. App. 57, 632 A. 2d 248 (1993) (“Sharp”).

In determining whether the presence of the proposed uses would be more harmful here than if located elsewhere in the AG zone, one must take into account the area where the use is proposed. AT&T Wireless Services v. Mayor and City Council of Baltimore, 123 Md. App. 681, 720 A. 2d 925 (1998) (“AT&T”).

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In Mossburg v. Montgomery County, 107 Md. App. 1, 666 A. 2d 1253 (1995) (“Mossburg”) the Court of Special Appeals had occasion to restate and clarify the law in Maryland regarding special exceptions. There the Court found that the Board of Appeals of Montgomery County improperly denied a special exception for a solid waste transfer station in an industrial zone. In reversing the Circuit Court, which upheld the Board's decision, the Court of Special Appeals found that the decision to deny the special exception was not based on substantial evidence of adverse impact at the subject site greater than or above and beyond impact elsewhere in the zone and, therefore, the decision was arbitrary and illegal. There the Court said:

“The question in the case sub judice, therefore, is not whether a solid waste transfer station has adverse effects. It inherently has them. The question is also not whether the solid waste transfer station at issue here will have adverse effects at this proposed location. Certainly it will and those adverse effects are contemplated by the statute. The proper question is whether those adverse effects are above and beyond, i.e. greater here than they would generally be elsewhere within the areas of the County where they may be established, ... In other words, if it must be shown, as it must be, that the adverse effects at the particular site are greater or “above and beyond”, then it must be asked, greater than what? Above and beyond what? Once an applicant presents sufficient evidence establishing that his proposed use meets the requirements of the statute, even including that it has attached to it some inherent adverse impact, an otherwise silent record does not establish that that impact, however severe at a given location, is greater at that location than elsewhere.” (emphasis supplied)

Thus, the Court of Special Appeals emphasized that once the applicant shows that it meets the requirements for the special exception under statute, the burden then shifts to the Protestants to show that impacts from the use at a particular location are greater at this location than elsewhere. If the Protestants fail to meet that burden of proof, the requested special exception must be approved.

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The testimony and record developed in this case do not lead to the conclusion that there are no adverse impacts associated with this communications tower. To the contrary, every communication tower has associated with it some adverse impacts including the visual intrusion of their presence into the Agricultural landscape. However the test for approval is not whether there is a material impact but whether that impact at the proposed location is greater than the impacts normally associated with a communications tower regardless of its location within the zone. The Harford County Code provisions governing the grant of a special exception use for a communication tower are onerous indeed and place a substantial burden of proof upon an applicant wishing to construct such a tower. The Code requirements are designed to uncover each and every impact associated with a tower and allow a thorough analysis of those impacts to be developed and considered by the Board.

Based on the facts presented and applying the guidance of the Schultz and Mossburg courts, the Hearing Examiner comes to the inescapable conclusion that this proposed communication tower meets or exceeds each and every statutory requirement of the Harford County Code and will not result in adverse impacts greater than or different than similar monopole communication towers found at other locations throughout the Agricultural zone.

The Hearing Examiner recommends approval of the special exception to erect a communication tower subject to the following conditions:

1. A site plan be submitted for review and approval through the Development Advisory Committee (DAC).
2. The Applicants obtain any and all necessary permits and inspections and provide the financial surety pursuant to Harford County Code Section 267-53.5(l).
3. That the Applicant submit for review and approval a landscaping plan that will provide adequate screening of the ground level compound from view of adjacent properties.
4. That the Applicant construct the facility in material conformance with the site plan submitted herein.

Date JUNE 10, 2002

William F. Casey
Zoning Hearing Examiner